construction of sub-s. 5 of s. 7, and I agree with them. It is to be read merely as conferring on orders of the Board an immunity from proceedings to vary or set them aside in Courts of Law.

Manning, J.—I have read the judgments of the Acting Chief Justice, Federated Malay States, and of the Acting Judge of Appeal. I agree with their conclusions and with the grounds on which those conclusions are based.

Appeal allowed.

ARJAN SINGH vs. HASHIM ANGULLIA.

[Original Civil Jurisdiction (Aitken, J.A.)

September 1, 1941]

Moneylenders Ordinance (Cap. 218) s. 4—Memorandum of the contract.

There is no presumption that the provisions of the Moneylenders Ordinance have been complied with by the moneylender and the onus is always upon him to prove the same.

A borrower can always adduce evidence to show that the terms of the actual contract between him and the moneylender have not been truly and fully set out in the memorandum of contract prepared under s. 4 sub-s. 1 or sub-s. 4 of the Moneylenders Ordinance. Such evidence is evidence which would entitle a borrower to a decree or order under Proviso 1 to s. 93 of the Evidence Ordinance; and unless such facts can be proved s. 4 sub-s. 1 of the Ordinance would be nugatory and meaningless.

Cases referred to:—

(1) *R. Shanmuga Rajeswara Sethupathi v. Chidambaram Chettiar* A.I.R. (1938) 123 P.C.

(2) *Narain Singh v. D. Sundram* Singapore Suit No. 284 of 1939 (unreported).

(3) *Rebello v. Harbans Singh* (1933) M.L.J. 279.

(4) *Somasundaram Chetty v. Lim Ham Kai* (1927) S.S.L.R. 64.

(5) *Balkishen Das v. Legge* I.L.R. (Allahabad) Vol. 22 (149).

(6) *Maung Kjin v. Ma Shwa La* 44 I.A. 236.

(7) *Tsang Chuen v. Li Po Kwai* 1932 A.C. 715.

(8) *Khan v. Punjab National Bank* A.I.R. 1933 (Lahore) 965.

(9) *Chop Ban Aik v. Ang Khye Pang* (1939) S.S.L.R. 54; (1939) M.L.J. 282.

(10) *Allighan v. London and Westminster Loan Co.* 1940 3 A.E.R. 530.

(11) *Central Advance & Discount Corporation v. Marshall* 1939 2 K.B. 781.

(12) *Dunn Trust Ltd. v. Feetham* 1936 1 K.B. 22.

(13) *Ramanathan Chettiar v. Powell & Co.* Singapore Suit No. 105 of 1941 (unreported).

TRIAL OF ACTION.

A. Yellappa for plaintiff.

S. B. Aditan for 1st defendant.

John Laycock for 2nd defendant.

In this case the plaintiff, a Sikh moneylender, sued the defendants as the joint and several makers of a promissory note for $1,040. It was admitted that the transaction was a money lending transaction within the meaning of the Moneylenders Ordinance (Cap. 218) and particularly s. 4 and also pursuant to sub-s. 1 of that section the promissory note itself was the only note or memorandum of the contract prepared for the purposes of that section. The defendants pleaded (*inter alia*) that the terms of the contract had not been fully and correctly set out in the memorandum of the contract in that the amount lent was not $1,040 as appeared from the promissory note but only $60.00, and that it was one of the terms of the contract that the second defendant was only a surety, the whole loan having in fact been made to the first defendant. There were a number of other defences which are not material to this report as they were never decided.

Yellappa for the Plaintiff. The onus of proof is upon the defendant. The execution of the Promissory Note has been admitted. *R. Shanmuga Rajeswara Sethupathi v. Chidambaram Chettiar and others*[1]. Illustration (b) to Section 103 Evidence Ordinance. *Stone & Meston* on Burden of Proof at p. 101. Section 4 of the Moneylenders Ordinance (Cap. 218) is different from Section 6 of the English Moneylenders Act 1927. It contains no provision similar to Section 4 (4) of the local Ordinance.

John Laycock for the second defendant. There is no presumption that the moneylender has complied with all the requirements of the Moneylenders Ordinance. *Stone & Meston* on Moneylenders, 2nd Edn. p. 101. I submit this passage is correct law. Pedlow, J. recently ruled to exactly this effect in the unreported case of *Narain Singh v. D. Sundram & ors.*,[2].

S. B. Aditan for the first defendant adopted the argument by counsel for the second defendant.

Aitken, J.A.—All the cases cited to me by Mr. Yellappa appear to rest upon legal principles which would have been available to assist him had the Moneylenders Ordinance not been passed.

That Ordinance has laid upon professional moneylenders a number of important obligations, with which they must comply if they desire to seek the assistance of the law in recovering moneys lent and interest thereon. It seems to me, therefore, that as soon as a defence is filed denying that one or more of those obligations has or have been duly performed, an issue is joined and the burden of proving the affirmative rests upon the plaintiff who is the party asserting it.

Furthermore, I do not think that there is any presumption in favour of the plaintiff at this stage of the proceedings, and I hold that a moneylender cannot raise a presumption of due compliance with the provisions of the Moneylenders Ordinance in his own favour by recitals inserted in the body of a promissory note. It may well be, of course, that the fact of the defendants' signature on such a promissory note will afford some support of the plaintiff's oral evidence of such compliance; but that evidence must be given first of all.

Yellappa for the plaintiff: Although it has now been ruled that the onus of proof is upon the Moneylender, one of the pleas, in defence is that the second defendant signed as surety. Evidence to vary or contradict the terms of a written contract is inadmissible. A contract which does not comply with Section 4 (1) of the Moneylenders Ordinance is rendered unenforceable, but not void. The question whether or not all the terms are incorporated in the written contract is a question of evidence and not of validity. (7 *Hailsham* page 105 paragraph 147). Sections 92 and 93 of the Evidence Ordinance. *M. Rebello & another v. Harbans Singh*[3], *Somasundaran Chetty v. Lim Ham Kai*[4], *Balkishen Das v. W. F. Legge*[5], *Maung Kjin v. Ma Shwa La*[6], *Tsang Chuen v. Li Po Kwai*[7], *A. H. Khan v. Punjab National Bank Ltd.*[8]. The second defendant cannot be allowed to give evidence that he signed as surety.

John Laycock for the second defendant. The cases cited for the plaintiff are not cases under the Moneylenders Ordinance and are therefore not in *pari materia*. The Moneylenders Ordinance s. 4 provides that a note or memorandum of the whole contract is to be signed by the parties. If all the terms of the contract are not fully and truly set out in this memorandum the contract is made unenforceable by the section. If it was a term of the contract that the second defendant should be liable as a surety only, then the promissory note does not set out that term correctly. The requirements of the Moneylenders Ordinance must be strictly complied with. *Chop Ban Aik v. Ang Khye Pang*[9] in the Court of Appeal per Poyser, C.J. (F.M.S.) at p. 62. *Proviso* 1 to s. 93 of the Evidence Ordinance is directly in point. The facts pleaded if proved would render the promissory note unenforceable and would entitle the defendants to a declaratory order that the promissory note is unenforceable and that any securities be delivered up. *Allighan v. London and Westminster Loan and Discount Co., Ltd.*[10], *Central Advance and Discount Corpn. Ltd. v. Marshall*[11], *Dunn Trust Ltd. v. Feetham*[12]. The defendants will be entitled to a decree or order in this suit dismissing the action and an order for payment of their costs of suit. In fact a ruling was very recently given by Worley, J. admitting such evidence on an exactly similar plea in defence in a similar case in the case of *K.V.A. L.R.M.R.M. Ramanathan Chettiar v. Powell & Co., Ltd. & ors.*,[13] in which judgment on the main issues was reserved and which has therefore not yet been reported.*

S. B. Aditan for the first defendant. In *Chop Ban Aik v. Ang Khye Pang*[9] McElwaine, C.J. at p. 60 of the report in the Court of Appeal expressly held that evidence was admissible to prove that any provision of the Moneylenders Ordinance had not been observed. See also the judgment of Terrell, J.A. at p. 61—but the reference there to the first *proviso* to s. 91 is an obvious clerical error for the first *proviso* to s. 93.

Yellappa for the plaintiff. The allegation in *Chop Ban Aik's case*[9] was the defendants had not received a copy of the promissory note.

In *Allighan's case*[10] the note failed to mention the past transactions between the parties.

Aitken, J.A.—The joint effect of sub-ss. 1, 2 and 3 of s. 4 of the Moneylenders Ordinance appears to be this:—no contract for the repayment of money lent by a professional moneylender to a borrower, for which repayment one or more persons have agreed to stand as sureties, shall be enforceable unless a note or

* Judgment has now been delivered in this case. Worley, J. substantially agreed with the ruling of Aitken, J. on this point. It may also be noted that in the case of **Narain Singh v. D. Sundram & others**[2] (unreported) Pedlow, J. came to a similar decision and allowed evidence to be given to show that the 2nd and 3rd defendants only signed the note as sureties.

memorandum thereof, setting out correctly all the terms of the contract in the English language, has been signed by the parties thereto (or their respective agents).

From this it seems to follow that if the real agreement between the parties was that the money should be lent to the borrower A, and that B and C should stand sureties for him, then a note or memorandum thereof which purports to render A, B, and C all jointly and severally liable as principals does not comply with the provisions of those sub-sections and is therefore unenforceable.

Now the first *proviso* to s. 93 of the Evidence Ordinance enables oral evidence to be given of any fact which would invalidate a document, and if it can be proved that the note or memorandum of a moneylending contract to which s. 4 of the Moneylenders Ordinance applies does not correctly or fully set out the terms thereof, that document is surely 'invalidated', i.e., rendered of no force and effect, for all practical purposes.

For these reasons I rule that evidence is admissible to show that the real contract between the plaintiff and the second defendant was that the latter was to be liable as a surety only. The case of *Somasundaram Chetty v. Lim Ham Kai* (*supra*), though doubtless it was good law before the Moneylenders Ordinance came into force, appears to me to have been rendered obsolete by the changes effected by that Ordinance. In the Federated Malay States no similar legislation has been enacted hitherto, so that the decision of the Federated Malay States Court of Appeal in *Rebello & Peries v. Harbans Singh* (*supra*) is still the governing authority there on the point I have just decided.

Ruling accordingly.

Solicitors for plaintiff—*Braddell Brothers.*
Solicitors for first defendant—*Aditan & Co.*
Solicitors for second defendant—*Laycock & Ong.*

END OF STRAITS SETTLEMENTS OFFICIAL REPORTS.

F. M. S. REPORTS.

ABDUL RAHMAN vs. ESAH.

[Appellate Civil Jurisdiction (Horne, J.) October 22, 1940]

Distribution Enactment (Cap. 71), section 2—Probate and Administration Enactment (Cap. 8), section 188—Evidence Enactment (Cap. 10), sections 13 and 42—Intestacy—Muhammadan law—Local custom, proof of—Widow's share.

The Collector assumed that there was a custom under which the widow of a Malay agriculturist was entitled either to (a) one-half share of her deceased husband's property or (b) this half plus a widow's share under Muhammadan law out of the other half.

Held, that section 2 of the Distribution Enactment and section 188 of the Probate and Administration Enactment imply that the rules for distribution of a Muslim's estate are the rules of Muhammadan law as varied by local custom.

The case of **Haji Ramah v. Alpha**(1) is not an authority for the proposition that the widow is entitled to half share by succession: it is an authority for the proposition that in Selangor a widow who has worked on her husband's land has a claim for monetary compensation which may be proved against his estate.

The existence of local custom may be proved by authoritative decision or by evidence (Evidence Enactment, sections 42 and 13).

There being no evidence as to tribal organisation or as to the alleged custom in Pahang and no authority as to such organisation or custom having been cited, the judgment must be set aside and a re-hearing ordered.

Case referred to:—

(1) *Haji Ramah v. Alpha,* (1924) 4 F.M.S.L.R. 179.

Tengku Ismail for appellant.

Respondent in person.

Horne, J.—This appeal was brought from the order of J. F. F. Gregg, Esq.; made in Kuala Lipis Distribution Suit No. 35 of 1937. The grounds of judgment are very short but appear to me to assume that there is a custom under which the widow of a Malay agriculturist is entitled either to (a) one-half share of her deceased husband's property or (b) this half plus a widow's share under Muhammadan law out of the other half.

The deceased was apparently a Muslim and died intestate, and section 2 of Chapter 71 (Distribution Enactment) and section 188 of Chapter 8 (Probate and Administration Enactment) imply that the rules for the distribution of such an estate are the rules of Muhammadan law as varied by local custom.

So far as I am aware there is no Supreme Court judgment or any other reported judgment as to any local variations of the Muhammadan law rules for distribution in Pahang. The case of *Haji Ramah binti Mat Drus v. Alpha binti Osman & Ors.*(1), was cited during the hearing.

This case is not an authority for the proposition that the widow is entitled to half share by succession. It is an authority for the proposition that in Selangor a widow who has worked on land registered in the name of her husband has a claim for monetary compensation, which, if not satisfied before his death, may be proved against his estate.

In that case, however, although the widow was successful in her claim, succession clearly went according to Muhammadan law. In the present case the claim seems to be based upon an alleged custom as to succession. The suggested custom appears to be an imitation of one of the property rules current among the customary tribes in Negri Sembilan but there is no evidence as to tribal organization in Pahang.

An authoritative decision as to such a custom would be relevant to prove its existence: section 42 Evidence Enactment (Cap. 10). See also *Woodroffe and Ameer Ali,* Law of Evidence, 9 Edition 424. But there appears to be no such decision. Moreover, no evidence was taken before the Collector as to the existence of such custom: section 13 of Chapter 10 and *Woodroffe and Ameer Ali,* page 195 *et seq.*

It was stated during the hearing of this appeal that some Collectors hold that such custom exists; others that it does not exist. If so, it would appear that its existence is doubtful and that litigants who seek to rely upon the alleged custom should prove its existence.

There is no such evidence on the record nor does the Collector refer to any authority, and, as the judgment appears to be based on alleged custom, it is, for the reasons above, set aside and the application for distribution is ordered to be re-heard. At such re-hearing it will be open to the widow to base her claim upon and prove the existence of the custom.

No order as to costs of the appeal.

Appeal allowed. Judgment set aside and re-hearing ordered.

WONG NGIAN THIN vs. P. P.

[Appellate Criminal Jurisdiction (Cussen, J.), September 4, 1940]

The Customs Enactment (No. 5 of 1936), sections 51, 113, 114 and 124—False account of goods imported